



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

EC-G-1998-25

OFFICE OF ENFORCEMENT

MAR 5 1998

MEMORANDUM

SUBJECT: Model Notice of Violation

FROM: Michael S. Alushin *M.S. Alushin*  
Associate Enforcement Counsel

TO: Regional Counsels  
Regions I-X

Regional Air Division Directors  
Region I-X

The attached is an interim draft model notice of violation ("NOV"), that includes changes and additions from the Clean Air Act Amendments. NOVs being issued should now reflect the fact that there is no continuing violation requirement and that the source may have the burden in an enforcement proceeding to prove compliance after the date of the notice. This model can be adapted to the particular format already in use in the Region. Please use this model on an interim basis to accomodate changes which are presently effective under the Clean Air Act Amendments.

The use of the language describing the presumption of noncompliance is not limited to NOVs for SIP violations. Section 113(e)(2), for purposes of determining the number of days of violation, allows EPA to benefit from a presumption of a continuing violation "where the Administrator or an air pollution control agency has notified the source of the violation...". Thus, Section 113(e)(2) also presents the opportunity for the Agency to use this presumption in administrative orders or finding of violation notices. An order or a document containing a finding of violation by the Agency constitutes "notice" such that from the date of the document's issuance, the presumption of noncompliance begins to run and a source can be considered to be in violation until it establishes continuous compliance.

Because the presumption exists only where EPA "makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice...", the Region should be aware that, at some point, a

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demonstration that the violation is continuing or recurring in nature will be required. An order should include language, like that in the NOV, notifying the source that EPA considers the source to be in violation until it establishes continuous compliance. It should also include the "Penalty Assessment Criteria" section from the NOV that contains the language creating a presumption of noncompliance.

This model can be used now, though language regarding administrative penalty orders should only be used after the implementing Part 22 hearing procedures are promulgated. Promulgation is expected by September, 1991.

Please submit comments on this draft to Alexandra Callam by April 1, 1991. In addition, please let me know of any developing cases that could serve as a test of the new presumption of noncompliance, i.e. cases that have favorable facts for determining the extent to which EPA must show that a violation is continuing and for determining the nature of defendant's burden to prove compliance. We are available to assist you with the initial cases where the issue is presented.

Attachment

cc: Regional Counsel  
Air Contacts

John Rasnic, Acting Director  
Stationary Source Compliance Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION

STATUTORY AUTHORITY

THIS NOTICE OF VIOLATION (NOV) is issued to Company Name ("Respondent"), for violations at its facility located at Company Address, pursuant to Section 113(a)(1) of the Clean Air Act (the Act), 42 U.S.C. Section 7413(a)(1), as amended on November 15, 1990 by P.L. 101-549. Section 113(a)(1) requires the Administrator of the United States Environmental Protection Agency (EPA) to notify a person in violation of a state implementation plan or permit of the violation. The authority to issue NOV's has been delegated to the Division Director, Branch, EPA, Region.

## FINDINGS

1. The state administrative code, Section 010, provides that no person shall cause, suffer, allow, or permit volatile organic compounds ("VOC") to be emitted into the outdoor atmosphere from a source operation under Section 020, in excess of the emission rate as determined in accordance with Table 030.

2. Section 010 is a part of the federally-approved and federally-enforceable state implementation plan (see 40 CFR 52. )

3. Company name manufactures drugs and vitamins in capsules. Company name uses a granulation drying process to evaporate solvent used in washing the capsules. The drying oven used by Respondent is a source operation listed under Section 020.

4. On date, duly authorized EPA inspectors conducted an unannounced inspection of the company name facilities at address in accordance with Section 114 of the Act. The inspectors observed the operation of the drying oven and found that there were no devices to control the VOC emissions from the drying oven.

5. On date, EPA performed a stack test to measure the emissions from the drying oven to the outside atmosphere. The results of the stack test showed that the drying oven emitted solvent at emission rate.

6. Information provided by company name to the EPA pursuant to a Section 114 information request indicates that Respondent operates the drying oven at full capacity 14 hours per day, 6 days per week.

7. Under Section 010, the allowable emission rate for Respondent's drying oven, as determined by Table 030, is emission rate. Respondent emits % amount, in excess of allowable emission rate.

8. Therefore, Respondent is in violation, and is considered to be in violation until it establishes continuous compliance, of state administrative code, Section 010. [Respondent has been in violation of state administrative code, Section 010 since date. (Use if there are facts indicating the date noncompliance began prior to NOV issuance.)]

#### ENFORCEMENT

Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this Notice, the Regional Administrator (delegated?) may, without regard to the period of violation,

- issue an order requiring compliance with the requirements of the state implementation plan or permit, or

- issue an administrative penalty order pursuant to Section 113(d) for civil administrative penalties of up to \$25,000 per day of violation] (to be used after administrative penalty regulations are issued),

- bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation.

Furthermore, for any person who knowingly violates any plan or permit requirement more than 30 days after the date of the issuance of this Notice, Section 113(c) provides for criminal penalties or imprisonment, or both.

In addition, under Section 306(a), the regulations promulgated thereunder (40 CFR Part 15), and Executive Order 11738, facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant thereto. Violation of the Act may result in

the subject facility being declared ineligible for participation in any federal contract, grant, or loan.

#### PENALTY ASSESSMENT CRITERIA

Section 113(e)(1) of the Act states that the court, as appropriate, shall, in determining the amount of penalty to be assessed, take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method); payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

Section 113(e)(2) of the Act allows the court to assess a penalty for each day of violation. For purposes of determining the number of days of violation, where the EPA (plaintiff) (or the relevant air pollution control agency) makes a prima facie showing that the conduct or events giving rise to this violation are likely to have continued or recurred past the date of this NOV (or a previously issued air pollution control agency NOV for the same violation), the days of violation shall be presumed to include the date of this NOV (or the previous NOV) and each and every day thereafter until Respondent establishes that continuous compliance has been achieved, except to the extent that Respondent can prove by the preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

#### OPPORTUNITY FOR CONFERENCE

Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has the right to be represented by counsel. A request for a conference must be made within # days of receipt of this NOV. The request for a conference or other inquiries concerning the NOV should be made in writing to :

ORC Attorney

#### EFFECTIVE DATE

This NOV shall be effective immediately upon receipt.